

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 12th day of March, two thousand eight.

PRESENT:

HON. ROSEMARY S. POOLER,
HON. BARRINGTON D. PARKER,
HON. PETER W. HALL,
Circuit Judges.

SAIME SERRI, SAIDA SERRI, INA SERRI,
Petitioners,

v.

07-1469-ag
NAC

MICHAEL B. MUKASEY, UNITED STATES
ATTORNEY GENERAL,¹
Respondent.

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as a respondent in this case.

1 **FOR PETITIONER:** **Steven A. Mundie, Baron, Mundie &**
2 **Shelkin, P.C., New York, New York.**

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4 **FOR RESPONDENT:** **Michael B. Mukasey, United States**
5 **Attorney General, Civil Division, M.**
6 **Jocelyn Lopez Wright, Assistant**
7 **Director, Office of Immigration**
8 **Litigation, Yamileth G. HandUber,**
9 **Attorney, Office of Immigration**
10 **Litigation, Civil Division, United**
11 **States Department of Justice,**
12 **Washington, D.C.**

13
14 UPON DUE CONSIDERATION of this petition for review of a
15 Board of Immigration Appeals ("BIA") decision, it is hereby
16 ORDERED, ADJUDGED, AND DECREED that the petition for review
17 is DISMISSED, in part, and GRANTED, in part.

18 Petitioner, Saime Serri, a native and citizen of
19 Albania, seeks review of a February 2, 2007 order of the BIA
20 affirming the June 22, 2005 decision of Immigration Judge
21 ("IJ") Annette S. Elstein denying her application for
22 asylum, withholding of removal, and relief under the
23 Convention Against Torture ("CAT"), which included her two
24 daughters, Saida Serri and Ina Serri. In re Serri, Nos.
25 A 77 714 449/450/451 (B.I.A. Feb. 2, 2007), aff'g Nos. A 77
26 714 449/450/451 (Immig. Ct. N.Y. City June 22, 2005). We
27 assume the parties' familiarity with the underlying facts
28 and procedural history of the case.

29 When the BIA agrees with the IJ's conclusion that a
30 petitioner is not credible and, without rejecting any of the

1 IJ's grounds for decision, emphasizes particular aspects of
2 that decision, this Court reviews both the BIA's and IJ's
3 opinions - or more precisely, the Court reviews the IJ's
4 decision including the portions not explicitly discussed by
5 the BIA. Yun-Zui Guan v. Gonzales, 432 F.3d 391, 394 (2d
6 Cir. 2005). We review the BIA's factual findings, including
7 adverse credibility determinations, under the substantial
8 evidence standard, treating them as "conclusive unless any
9 reasonable adjudicator would be compelled to conclude to the
10 contrary." 8 U.S.C. § 1252(b)(4)(B); see Zhou Yun Zhang v.
11 INS, 386 F.3d 66, 73 & n.7 (2d Cir. 2004), overruled in part
12 on other grounds by Shi Liang Lin v. U.S. Dept. of Justice,
13 494 F.3d 296, 305 (2d Cir. 2007). (En Banc) However, we
14 will vacate and remand for new findings if the agency's
15 reasoning or its fact-finding process was sufficiently
16 flawed. Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391,
17 406 (2d Cir. 2005).

18 As an initial matter, under 8 U.S.C. § 1252(d)(1), this
19 Court "may review a final order of removal only if . . . the
20 alien has exhausted all administrative remedies available to
21 the alien as of right." This jurisdictional rule is
22 absolute with respect to the requirements that an alien

1 appeal to the BIA before filing a petition for review, see
2 Theodoropoulos v. INS, 358 F.3d 162, 165, 174 (2d Cir.
3 2004), and that on appeal to the BIA, he or she raise each
4 category of relief subsequently raised in this Court. See
5 Karaj v. Gonzales, 462 F.3d 113, 119 (2d Cir. 2006). Serri
6 did not seek a grant of "humanitarian asylum" pursuant to 8
7 C.F.R. § 1208.13(b)(1)(iii)(A) before the agency. Thus, as
8 a statutory matter, this Court is without jurisdiction to
9 consider her argument seeking that relief and must dismiss
10 the petition for review to that extent. See 8 U.S.C.
11 § 1252(d)(1).

12 In addition to the statutory requirement that
13 petitioners exhaust the categories of relief they seek, 8
14 U.S.C. § 1252(d)(1), petitioners must also raise to the BIA
15 the specific issues they later raise in this Court. See
16 Foster v. INS, 376 F.3d 75, 78 (2d Cir. 2004). Although the
17 government argues that Serri failed to exhaust her argument
18 that the agency erred in relying on the consular report
19 indicating that several documents she submitted were suspect
20 because she did not know that the documents were fraudulent,
21 the BIA directly addressed her testimony that she was not
22 aware that the documents were fraudulent. Consequently, as

1 such, that issue is considered exhausted and may be reviewed
2 by this Court. See Xian Tuan Ye v. DHS, 446 F.3d 289,
3 296-97 (2d Cir. 2006)

4 Substantial evidence does not support the IJ's adverse
5 credibility determination. See Zhou Yun Zhang, 386 F.3d at
6 73 & n.7. First, in denying her claim, the IJ violated
7 Serri's right to due process. See Li Hua Lin v. U.S. Dept.
8 of Justice, 453 F.3d 99, 104-05 (2d Cir.2006). She did not
9 have a full and fair opportunity to present evidence
10 rebutting the IJ's conclusions which were based on a
11 consular report which she received from the government one
12 day before her hearing. See Burger v. Gonzales, 498 F.3d
13 131, 135 (2d Cir. 2007). Although the IJ allowed her to
14 testify in rebuttal, she was not afforded an opportunity to
15 obtain or present rebuttal evidence before the IJ issued her
16 decision. Id. Moreover, the IJ's reliance on the absence
17 of specific rebuttal evidence, namely, affidavits from her
18 brother and her husband's nephew, was arbitrary: after
19 receiving the consular report she was denied an opportunity
20 to obtain any rebuttal evidence, much less these specific
21 documents.

22 The BIA also erred in relying on Serri's submission of

1 questionable evidence to support its adverse credibility
2 determination, because it failed to determine whether she
3 had knowledge that the documents might be fraudulent. See
4 Kourski v. Ashcroft, 355 F.3d 1038, 1039-40 (7th Cir. 2004)
5 (rejecting the agency's reliance on a forged birth
6 certificate because there was no evidence that the
7 petitioner knew or suspected the document to be forged when
8 he submitted it).

9 Additionally, the agency improperly found that Serri
10 only provided details regarding statements by her attackers
11 on cross-examination. Contrary to this finding, during
12 cross-examination the translator clarified that Serri had
13 stated during her direct testimony what the attackers said,
14 and the translator admitted to failing to translate it
15 during her direct testimony. Moreover, the omission in
16 Serri's asylum application of these statements was not a
17 material discrepancy that could support an adverse
18 credibility determination. She had alleged that the rapists
19 were Socialists, which sufficiently supported her claim that
20 she was attacked because of her involvement in the
21 Democratic Party. See Secaida-Rosales v. INS, 331 F.3d 297,
22 308 (2d Cir. 2003)

1 Remand is appropriate because it remains unclear
2 whether the agency would have reached the same conclusion
3 absent the errors. See Li Hua Lin v. U.S. Dept. of Justice,
4 453 F.3d 99, 111 (2d Cir.2006). Two of the errors - the due
5 process violation and the failure to determine whether Serri
6 knew or had reason to know that the documents might be
7 fraudulent - concern the consular report, and the IJ
8 explicitly stated during an April 2005 hearing that her
9 decision depended solely upon the result of that report.
10 See id. (finding that remand was necessary where an error
11 involved a finding that the IJ labeled "the most critical
12 issue here"). Moreover, the IJ relied on two additional
13 erroneous findings to support the decision. See id.

14 For the foregoing reasons, the petition for review is
15 DISMISSED, in part, and GRANTED, in part. Additionally, the
16 decision of the BIA is VACATED, and the case REMANDED for
17 further proceedings consistent with this decision.

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19
20 FOR THE COURT:
21 Catherine O'Hagan Wolfe, Clerk
22

23 By: _____
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